No. 233

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

DONALD SIMON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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The Government's argument starts out with a demonstration of a complete misapprehension of this case.

This is not a case wherein it is being determined whether matters set forth in an affidavit were sufficient for the issuance of a warrant. This case is an appeal from a conviction for the alleged assault upon federal officers. Contrary to the Solicitor General's submission, this issue is squarely before the court as to whether, in the absence of evidence of probable cause for arrest, a conviction for assault under Title 18, Section 111, U.S.C. can be maintained. The question before this court is, whether this

court's many decisions on affidavits for the issuance of warrants may be substituted for an evidentiary showing of probable cause.

It is evident that the court below (Court of Appeals for the Seventh Circuit) did not distinguish the difference between the evaluation of an affidavit for issuance of a warrant, and the Sixth Amendment rights of confrontation, and cross-examination guaranteed to a defendant on trial. This is the main point of this Petition for Certiorari, and it doesn't seem to be comprehended by the United States.

The Solicitor General's final statement (exclusive of alleged authority) is the proposition against which we contend:

> "If petitioner wanted to test legality of his arrest, he had other, peaceful methods available, short of physical violence."

Precisely the point!!! Is he obliged to submit to an illegal arrest, because later at some convenient time, he could demonstrate the arrest to be illegal. The Solicitor General would have this court confuse the cases upon which an affidavit for an arrest warrant was filed and the warrant issued prior to arrest, and then the basis for the issuance found to be insufficient, and a warrantless arrest.

The agents have statutory authority to execute warrants and when he is executing a warrant the authority given an agent of the Bureau of Narcotics to execute arrest warrants is without limitation. (26 U.S.C., Section 7607(1)) But the authority to make arrests without warrant is conditioned upon the arresting officer having "reasonable grounds to believe that the person to be arrested has committed or is committing [a violation relating to narcotic drugs or marijuana]". (26 U.S.C. §7607(2)) Thus the fact of the existence of an arrest warrant would be suf-

ficient evidence on trial to demonstrate the agents were engaged in the performance of their official duties. Equally, evidence must be shown of the "reasonable grounds" when he assumes to exercise his authority to arrest without warrant in order to show that he was in the exercise of his official duties. The difference between a warrantless arrest and the execution of an arrest warrant seems to be lost on the United States.

Not only is that issue squarely before this court, it was put squarely before the court below. This petitioner urged that that court not be confused between the evaluation of a complaint for issuance of a warrant and the Sixth Amendment guarantees to an accused. Since the United States Attorney at the trial level did not understand the difference, since the Seventh Circuit Court of Appeals did not understand the difference, and since the Solicitor General of the United States does not seem to understand the difference, we can only urge this Court to comprehend the distinction in the interest of preserving constitutional guarantees. What the decision of the Court of Appeals does, what the Solicitor General urges, is trial by affidavit, and, on an affidavit that was never introduced into evidence. Trial by affidavit is approved baldfacedly by the Solicitor General and he makes it quite clear that the ex parte affidavit,—not subject to cross-examination, and derogation of the right of confrontation—is necessary to sustain this conviction:

> "Probable cause is a matter of law to be decided by the court, and where the trial court is also the trier of fact, as in this case, the courts could properly constitute information which is on the record at prior stages of the proceedings." (Brief of the United States in Opposition, page 5)

The Court of Appeals for the District of Columbia would be shaken, we submit, if it were advised that its decision in *Gatewood* v. *United States,* 209 F. 2d 789 was being used as condoning this trial by affidavit—an affidavit not in evidence. In *Gatewood*, there was a hearing on a motion to suppress and all three police officers involved in the arrest testified at that preliminary hearing concerning their actions. No police officer, or agent, or anyone was subjected to examination on the motion to quash filed here. See the Court's decision on the motion to quash. Common Law record beginning page 25 through 28. On the trial of the *Gatewood* case one of the officers testified to the circumstances surrounding the illegal arrest and under his testimony the court found the "illegality of the entry was shown even more clearly . . ." Though satisfied that the evidence at the trial established the illegality of the arrest, the Government protested that the question was not properly before the court because the defendant-appellant had not brought up the transcript of the hearing on the pre-trial ruling of a different judge, apparently on the theory that you have to decide which judge's ruling is being appealed from and that one judge cannot be reversed because of an earlier judge's mistake. Though the Court of Appeals held that an erroneous ruling by one judge prior to trial is not binding or final as to a judge later trying the cause, it brought up the record and concluded that both judges were wrong.

Here, the whole of the answer of the United States relies upon an affidavit, no part of the record, not subject to cross-examination, nor confrontation. For instance:

> "In view of the informant's warning that petitioner suspected trouble and said he was going to abscond, the arrest without a warrant was clearly lawful." (P. 5, Brief of the United States in Opposition)

This is found only in the affidavit; no such evidence on trial; the informant was not a witness, necessarily he could not be cross-examined.

And we respectfully submit basically erroneous is the statement later:

> "It was specifically stated at trial, however, that the affidavit accurately reflected the agents' information at the time of the arrest (Tr. 98-99). And defense counsel objected when the prosecutor attempted to go into the basis for probable cause at trial and when he attempted to introduce the affidavit in evidence (Tr. 20-21, 114)." (Page 5, Brief of the United States in Opposition)

The person who testified that the information contained in the affidavit was the basis for the arrest had never received any information from any informant. He never discussed any possible violation of the marijuana laws with any informant. He did not make the affidavit. Thus, when the prosecutor attempted to introduce the affidavit into evidence on the basis of his testimony, it was denied admission obviously. We know no theory on which it could have been introduced during Agent Haight's (the affiant) testimony. We can fathom no basis on which it could have been introduced during the testimony of a fellow agent who knew nothing but what Haight told him.

CONCLUSION

In the light of the true circumstances, the opinion below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

Wherefore, it is respectfully urged that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review this cause.

Respectfully submitted,

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